IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

COMMISSIONER OF INTERNAL REVENUE,
Respondent and
Petitioner below,

against

JAMES R. WASHER, Executor, Estate of
Benjamin Seelig Washer,
Petitioner and
Respondent below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the Board of Tax Appeals is not reported, but appears in the Record (R. 15); the opinion of the Circuit Court of Appeals for the Sixth Circuit, dated April 16, 1942, is reported at 127 F. (2d) 446 and appears in the Record (R. 58-63).

II

Jurisdiction

(1) The date of the decree to be reviewed is April 16, 1942.

(2) The statutory provision which sustains the jurisdiction of this Court is Judicial Code Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A. Title 28, §347.

III

The Question Presented

The question presented to the Court on this record is whether the inclusion of the entire proceeds of the life insurance policies on decedent's life in his gross estate is contrary to the decisions of this Court and in conflict with the decisions of various circuit courts of appeal and an unwarranted extension of the applicable statute (§302(g) of the Revenue Act of 1926).

IV

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. The facts have been stipulated by the parties (R. 27-51). Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows:

V

Specification of Errors

1. The Court erred in holding that the decedent retained legal incidents of ownership in all or any of the policies of insurance upon his life within the contemplation of Section 302(g) of the Revenue Act of 1926.

2. The Court erred in permitting respondent to claim that the decedent retained legal incidents of ownership in all or any of the said policies in view of the express acknowledgment by the respondent in his notice of deficiency addressed to the petitioner that the decedent at the time of his death did not possess any legal incidents of ownership whatever in said policies.

3. The Court erred in holding that the entire proceeds of all of the policies were includible in the taxable estate of the decedent and in not limiting the same to the value of the interest retained therein by the decedent.

4. The Court erred in holding that the proceeds of policies of insurance which were contracted for prior to February 24, 1919, the effective date of the Revenue Act of 1918, were includible within the gross estate of the decedent for estate tax purposes.

VI

Summary of the Argument

(a) Section 302(g) of the Revenue Act of 1926 does not require the inclusion within his gross estate of all or any of the proceeds of the policies on the life of the decedent because the decedent possessed no legal incidents of ownership in said policies prior to his death.

(b) The applicability of Section 302(g) was not properly before the Circuit Court of Appeals and the said Court should not have considered this statute.

(c) In any event, the Circuit Court of Appeals should have limited the amount of the proceeds of the policies includible within the gross estate of the decedent to the value of the interest retained by the decedent in such policies.

(d) In any event, the Circuit Court of Appeals should have excluded the proceeds of all policies contracted for prior to the effective date of the Revenue Act of 1918.

VII

Argument

POINT A

Section 302(g) of the Revenue Act of 1926 does not require the inclusion of all or any of the proceeds of the policies on the life of the decedent within his gross estate because the decedent possessed no legal incidents of ownership in said policies prior to his death.

The application of Section 302(g) of the Revenue Act of 1926, as amended by the Act of 1934, has been consistently construed as contingent upon the insured possessing "legal incidents of ownership" in the policies at the time of his death. Beginning with *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 73 L. ed. 404, and continuing down to the present, this doctrine has been recognized and enunciated in a long line of cases, including:

Bingham v. *United States,* 296 U. S. 211, 80 L. ed. 160;

Industrial Trust Co. v. *United States,* 296 U. S. 220, 80 L. ed. 191;
Commissioner v. *Kellogg* (C. C. A. 3), 119 F. (2d) 54;
Levy's Estate v. *Commissioner* (C. C. A. 2), 65 F. (2d) 412;
Walker v. *United States* (C. C. A. 8), 83 F. (2d) 103.

This construction had been accepted by the Treasury Department, whose regulations from time to time have contained various interpretations of "legal incidents of ownership" (see Art. 25 of Reg. 80 [1934, 1937 Ed.], as amended by T. D. 5032, 1940-1941 Cum. Bull. 427).

The Commissioner in his notice of deficiency (R. 11) likewise concurred in the settled interpretation of this section when he stated:

> "The surrender by the decedent of all his rights and benefits under the policies in question, subject however to said rights and benefits being restored to him with the consent of the beneficiary, deprived the decedent of all incidents of ownership in the policies."

The Commissioner, however, in the Circuit Court of Appeals urged that the decedent had possessed legal incidents of ownership in the policies sufficient to warrant the inclusion of the proceeds thereof in the decedent's gross estate under the provisions of Section 302(g).

The Circuit Court adopted the contention urged by the Commissioner. The Court based its opinion upon the language of this Court in *Helvering* v. *Hallock,* 309 U. S. 106, 84 L. ed. 604, and held that where a possibility of reverter remained, however remote, the transfer took effect only upon death, and that the death of the insured was the identifiable event determining both the incidence of the tax and its measure.

It is submitted that the construction placed upon the *Hallock* case, *supra,* is in direct conflict with *Bingham* v.

United States, supra, and *Industrial Trust Co.* v. *United States, supra.* The opinion in the *Hallock* case does not refer to, much less overrule, either of these decisions, and it is submitted that in the absence of a definite pronouncement by this Court to the contrary they retain their vitality and binding effect.

The *Hallock* case dealt with the interpretation of Section 302(c), since it was concerned with the interest retained by the settlor of an *inter vivos* trust, and not with the contingent rights reserved by the insured under policies of life insurance. The extension, therefore, of the doctrine of the *Hallock* case to insurance cases required the Circuit Court of Appeals to hold that the *Hallock* case impliedly overruled the *Bingham* and *Industrial Trust Co.* cases, *supra,* despite the fact that no reference is to be found to these cases in the *Hallock* case. It is submitted that in view of the countless policies of insurance presenting similar problems, this Court should finally settle the proper application of the doctrine of the *Hallock* case.*

The difference between the reservation by an insured of a right which is dependent upon an infinitestimal chance and the reservation of a similar right by the settlor of a trust is emphasized by the impact of Section 302(g) as contrasted with 302(c). Thus the Circuit Court in the instant case held the entire proceeds of the policies taxable. On the other hand, it is well settled that only the value of the interest reserved by the grantor of a trust is taxable. *Helvering* v. *Hallock, supra; Commissioner* v. *McLean,* 127 F. (2d) 942.

Beyond the differences between the statutes involved and between an *inter vivos* trust and insurance, the facts in

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* The necessity for clarification of the principle of the *Hallock* case is evidenced in the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean,* 127 F. (2d) 942, where the Court said:

> "For, since *Sanford* and *Hallock, supra,* came down to confuse and confound followers and expounders of gift tax law, the voices of both Board members and Circuit Judges are merely voices crying in the wilderness, and perhaps until the Supreme Court has spoken authoritatively on the question they would do best to decide the questions posed with as little bewordling and as few reasons as possible. (Cf. Paul Federal Estate and Gift Taxation, Chapters 7 and 17.)"

the instant case warrant, it is submitted, different treatment from that accorded the taxpayer in the *Hallock* case. In the *Hallock* case the settlor became repossessed of his property in the event that the life tenant predeceased him. This was certainly a not unlikely contingency. *Per contra*, in the instant case the decedent's estate would have benefited only in the concededly "extremely remote" contingency of the beneficiary surviving her two sons and grandchildren and not receiving the total proceeds of the policies prior to her death.

In this aspect the case resembles more closely the *Bingham* and *Industrial Trust Co.* cases, *supra*, where the proceeds were payable to the wife of the decedent and, if she predeceased the insured, to his children, and, if none then living, to his legal representatives. In the instant case the contingency includes grandchildren and to that extent is even more remote than those involved in the *Bingham* and *Industrial Trust Co.* cases.

Since the decision of this Court in the *Hallock* case, *supra*, the Circuit Court of Appeals for the Third Circuit has held in *Commissioner* v. *Kellogg*, 119 F. (2d) 54, that contingencies similarly remote are to be disregarded in determining the gross estate of the settlor of a trust.

The only other possibility whereby the decedent could have acquired control over his policies of insurance or the proceeds therefrom was in the event of the prior death of the beneficiary. In such event, it is true, decedent would have been entitled to exercise the right of revocation and similar rights under the policies. This was neither a possibility of reverter nor anything resembling the same. It was at most a contingent power of revocation, and the holding of the Circuit Court of Appeals, therefore, that such reservation brought the case within the principle of the *Hallock* decision is not only a further and unwarranted extension of that case but is contrary to the decision of other circuit courts of appeals decided since the *Hallock* case and with that decision before them.

Commissioner v. *Betts* (C. C. A. 7, Nov. 26, 1941), 123 F. (2d) 534;
Helvering v. *Dunning* (C. C. A. 4, Mar. 10, 1941), 118 F. (2d) 341.

See also:

Reinecke v. *Northern Trust Co.*, 278 U. S. 339, 73 L. ed. 410.

Thus, in the *Betts* case, *supra*, the Court said (p. 538):

> "There was not vested in the grantor power to revest in himself title to any part of the corpus of the estate. He had the remote power, if he survived the beneficiaries, to revoke the trust, but this was not vested in him but was remote, contingent and uncertain with no assurance of its ever coming into existence. Thus in *Helvering* v. *Dunning*, 4 Cir., 118 F. 2d 341, 343 the court approved this language: 'The grantor is again immune from taxation where he retains only a contingent power of revocation. * * *'"

POINT B

The applicability of Section 302(g) was not properly before the Circuit Court of Appeals and the said Court should not have considered this statute.

The statutory notice of deficiency (§501, Revenue Act of 1934) sent to the petitioner by respondent, Commissioner of Internal Revenue (R. 9-13) contained the following statement (R. 11):

> "The surrender by the decedent of all his rights and benefits under the policies in question, subject, however, to said rights and benefits being restored to him with the consent of the beneficiary, deprived the decedent of all incidents of ownership in the policies, and having no incidents of ownership, the policies are not taxable unless some provision of the Revenue Act not predicated on the ownership of an economic interest in the policies brings them within the scope of the Act. That purpose is effected by Section 302(d)."

This specific acknowledgment by respondent that the decedent possessed no legal incidents of ownership in the policies and that if the proceeds thereof were includible in the decedent's estate such result could be affected only by Section 302(d) precludes the Commissioner from urging at a later stage in the proceeding, e.g., on appeal to the circuit court of appeals, that the decedent possessed legal incidents of ownership in the policies and that consequently they are taxable within the provisions of Section 302(g).

The Circuit Court of Appeals dismissed this contention of petitioner upon the asserted authority of *Hormel* v. *Helvering,* 312 U. S. 552, 85 L. ed. 1037, and *Helvering* v. *Richter,* 312 U. S. 561, 85 L. ed. 1043.

It is submitted, however, that the instant case goes beyond a mere failure on the part of the Commissioner to assert the applicability of Section 302(g) in his notice of deficiency. Rather, the Commissioner expressly acknowledged that no legal incidents of ownership existed and consequently must be taken to have waived all claim as to the applicability of Section 302(g). In this aspect the case is within the principle of the following decisions of this Court:

Helvering v. *Wood,* 309 U. S. 344, 84 L. ed. 796;
Helvering v. *Tex-Penn Oil Co.* 300 U. S. 481, 81 L. ed. 755;
Helvering v. *Salvage,* 297 U. S. 106, 80 L. ed. 511;
General Utilities & Operating Co. v. *Helvering,* 296 U. S. 200, 80 L. ed. 154.

It is submitted that the notice of deficiency is analogous to a complaint in a civil action. The sole issue tendered was the applicability of Section 302(d). To permit the Commissioner to withdraw his express waiver of Section 302(g) at a later stage in the proceeding and after the petitioner committed the estate to litigation on the only issue tendered is not to do "as justice may require" (U. S. C. A., Title 26, §1141).

POINT C

In any event, the Circuit Court of Appeals should have limited the amount of the proceeds of the policies includible within the gross estate of the decedent to the value of the interest retained by the decedent in such policies.

As we have seen, the Circuit Court of Appeals conceded in its opinion in this case that the contingencies whereby the decedent might have reaped some advantages from the policies were "unlike those in the Hallock case, extremely remote". Nevertheless, in the *Hallock* case the amount included in the gross estate of the settlor of the trust was limited to the value of the "possibility of reverter" reserved to him.

The Court of Appeals refused, however, to limit the amount to be included in the gross estate of the decedent to the value of the possibility of reverter which it held existed. It apparently held that the "possibility of reverter" in the instant case was "an intangible element in respect to value, and incapable of measurement" (R. 62).

It is submitted that this holding is contrary to the decisions in the *Hallock* case and in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347-8, *supra*. It is also in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *McLean*, 127 F. (2d) 942, *supra*, and with the Court of Claims in *Central Nat. Bank of Cleveland* v. *United States*, 41 F. Supp. 239, 247-8. In the *McLean* case the argument that the possibility of reverter was incapable of measurement was rejected. In the *Central Bank* case it was specifically held that the deficiency was to be computed upon the value only of the interest found to have been retained and transferred by the death of the decedent.

POINT D

In any event, the Circuit Court of Appeals should have excluded the proceeds of all policies contracted for prior to the effective date of the Revenue Act of 1918.

Six of the policies involved were contracted for prior to the effective date of the Revenue Act of 1918 (R. 32). It is submitted that as to such policies Section 302(g) is not applicable.

Bingham v. *United States, supra;*
Lewellyn v. *Frick,* 268 U. S. 238, 69 L. ed. 934;
Helvering v. *Parker* (C. C. A. 8), 84 F. (2d) 838.

Irrespective of the effect of the *Hallock* case upon the *Bingham* and *Industrial Trust Co.* cases, *supra,* it is submitted that the *Hallock* case in no way overrules or casts doubt upon the doctrine of those two cases insofar as they held that policies written before the Revenue Act of 1918 were beyond the reach of Section 302(g).

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the decree of the United States Circuit Court of Appeals for the Sixth Circuit should be reversed and the decision of the United States Board of Tax Appeals affirmed in order that justice may be done to petitioner; that to such an end a writ of certiorari should be granted and this Court should review the decision of

the United States Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

Respectfully submitted,

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